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Supreme Court, U. S.
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No. .....

In The Supreme Court of The United States

OCTOBER TERM, 1973

72-1458

CHARLES V. CLEMENT, JR., and
BARBARA G. CLEMENT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on January 26, 1973.

OPINIONS BELOW

The Opinion of the District Court and the Opinion of the Court of Appeals are not yet officially reported. The former opinion appears as Appendix A hereto and the latter as Appendix B.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1). The opinion and judgment of the Court of Appeals (Appendix B) was dated and entered January 26, 1973. This petition for *certiorari* is being filed within ninety days of said date.

QUESTIONS PRESENTED

1. Is a taxpayer's statutory right to contest an alleged deficiency in federal income tax prior to payment of the deficiency determined precluded by an invalid assessment and collection?

2. Is a claim of overpayment of tax and credit made on a timely filed joint federal income tax return sufficient to sustain a suit for refund of the claimed overpayment where the requested credit was not made by the Commissioner of Internal Revenue?

3. May a taxpayer without filing a claim for refund recover an amount submitted in payment of a specified income tax liability which amount has been applied by the Commissioner of Internal Revenue to an illegally assessed tax?

STATUTES INVOLVED

26 U.S.C. § 7422(a) provides:

"NO SUIT PRIOR TO FILING CLAIM FOR REFUND. — No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

26 U.S.C. § 6213(a) and (b)(1) provide:

"(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT. — Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 *no assessment of a deficiency in respect of any tax imposed by subtitle A* or B of chapter 42 *and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer,* nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with

the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), *the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.*" (emphasis supplied)

"(b) EXCEPTIONS TO RESTRICTIONS ON ASSESSMENT.—

(1) MATHEMATICAL ERRORS.—If the taxpayer is notified that, on account of a mathematical error appearing upon the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (2) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section."

26 U.S.C. § 7421(a) provides:

"TAX.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for

the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

STATEMENT OF THE CASE

This is a suit to recover $22,406.05 paid by plaintiffs to the United States. Federal jurisdiction is based on 28 U.S.C. § 1340 and § 1346.

The plaintiffs established a Massachusetts business trust called the Clement Realty Trust (the "Trust") on June 30, 1958, and deeded to the Trust several parcels of income-producing real estate. The plaintiffs were the trustees. Thereafter the plaintiffs filed tax returns and paid taxes treating the Trust as a separate taxable entity. On January 20, 1965, the Commissioner, through his delegate, sent out two "30 day" letters, one to plaintiffs individually and one to plaintiffs as trustees of the Trust. Both letters concluded that the income of the Trust was taxable to the plaintiffs as individuals. The letter to the plaintiffs as individuals proposed deficiencies for the years 1959-1962 of $35,381.13. The letter to the plaintiffs as trustees proposed overassessments of $12,965.08, being the amounts of tax the Trust had paid since its creation.

On April 14, 1965, a little less than three months later, the plaintiffs filed their detailed individual tax return for 1964. On the front page of their Form 1040, they reported taxable income of $108.86 on line 11.d. and adjusted gross income of $4,593.63 on line 9. However, on line 12. entitled "Tax", plaintiffs typed in "Schedule Attached" and entered the figure $22,423.47. On the attached schedule to the return were the following:

Net deficiency Per R.A.R. (Revenue Agent's Report) dated January 20, 1965	$35,381.13
Tax on amount in line 11.d., Page 1 of this return	17.42
Total Liability	$35,398.55
Net Overassessment Per R.A.R. dated January 20, 1965	12,975.08
Amount of Tax	$22,423.47

The federal income tax withheld from plaintiffs for 1964 was $14,856.24, and the plaintiffs reported on line 18 of their 1964 return a tax due of $7,567.23, being the difference between $22,423.27 and the amount withheld. A check for this amount was transmitted with the return.

The Commissioner's delegate erroneously recorded the "Tax"—"Schedule Attached" of $22,423.47 as the tax due from the plaintiffs for the year 1964 and, of course, failed to credit the overpayment shown on the return, as well as the amount transmitted with the return, to the deficiencies in tax determined against the plaintiffs for 1959 through 1962.

These facts were conveyed to the Commissioner as a result of an audit of plaintiffs' tax returns for the years 1963 through 1965. This audit was concluded in May of 1967. For 1964, the auditing agent proposed an increase in taxable income from the 108.86 reported to $55,042.34. Additionally, the auditor treated the prior error in recording the tax due as an assessed tax since he proposed an overassessment of income tax of $1,547.61.

The Commissioner has at no time issued a statutory notice of deficiency in income tax to the plaintiffs for the year 1964.

The Plaintiffs subsequently brought this suit seeking to recover an amount calculated as follows:

Amounts withheld from plaintiffs during 1964	$14,856.24
Amounts transmitted by plaintiffs with 1964 return	7,567.23
Total	$22,423.47
Less the tax shown to be due for 1964 by the return	17.42
	$22,406.05

The District Court held (see Appendix A) that the 1964 tax return constituted an implied claim for a refund of the $22,406.05, that the 1967 30-day letter constituted a disallowance of $20,875.86 of that refund claim, and that plaintiffs could recover the difference, $1,547.61. Both plaintiffs and defendant appealed.

On appeal the defendant at page 6 of its brief conceded that "[U]nder no circumstances could the 1967 30-day letter be construed as a disallowance of any portion of a claim for refund." The Court of Appeals reversed the District Court's ruling that the plaintiff's 1964 tax return constituted an implied claim for refund and ordered the case to be dismissed for plaintiffs' failure to comply with § 7422(a) of the Internal Revenue Code of 1954.

REASONS FOR GRANTING THE WRIT

This case uniquely presents several questions fundamental to the administration of the Federal Internal Revenue Code. Additionally, the decision of the Court below

is in conflict with decisions of this Court and with the bases of decisions of other Courts of Appeals.

A. *A Taxpayer May Not be Deprived By Clerical Error of His Statutory Right to Contest an Alleged Deficiency in Income Tax Prior to Payment of the Alleged Deficiency.*

The Court below concluded:

> "Involuntary assessment and collection of an amount above that shown to be due in the return [$17.42] must be pursuant to statutory deficiency proceedings, not here undertaken. . . . But we see nothing to take this case outside the broad coverage of § 7422(a), applying to suits for the recovery of taxes 'erroneously or illegally assessed or collected' and 'any sum wrongfully collected.' "

Thus the question is squarely put as to whether the Commissioner can—by clerical mistake—avoid the mandate of § 6213(a) that

> ". . . no assessment of a deficiency in respect of any tax imposed by subtitle A or B of Chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until [a deficiency] notice has been mailed to the taxpayer . . ."

and thereby deprive the taxpayer of his right to contest the asserted liability prior to payment.

The Commissioner is required and only authorized to assess "the amount shown as the tax by the taxpayer on his return," § 6211(a), except for adjustments due to mathe-

matical errors, § 6213(b), unless deficiency procedures are employed. *Moir* v. *Commissioner*, 3 B.T.A. 21 (1925); *Gebelein* v. *Commissioner*, 37 B.T.A. 605 (1938); *Penn Mutual Indemnity Co.* v. *Commissioner*, 277 F.2d 16 (C.A. 3, 1960). It is apparently the position of the U.S. and the court below that a mere clerical mistake in recording on the assessment list "the amount shown as the tax" by the taxpayer avoids the deficiency procedures set out in §§ 6211-6214.

It is clear that the amount recorded as the assessed amount, $22,423.47, had no relationship to the taxpayers' income tax liability for 1964 by any standard. Accordingly, any assessment of the amount is not authorized.

Mere clerical mistakes should not deprive a taxpayer of the explicit notice requirements and rights of appeal to the United States Tax Court prior to payment of the alleged liability as set out in §§ 6212-6214.

One of the basic principles of the federal tax system is that a taxpayer has a right to judicial review of deficiency determinations *prior* to payment. This right was established in 1924 in response to the hardships created by the prior procedure that required the taxpayer to pay the deficiency and then contest it. "The inherent harshness of the pay first—litigate later scheme led Congress in 1924 to establish a non-prepayment forum, the Board of Tax Appeals." *Schreck* v. *United States*, 301 F.Supp. 1265, 1269 (D.Md. 1969). This right to prior judicial review is implemented by the requirement under § 6213 that a deficiency notice issue, which in turn is the taxpayer's "ticket" to the Tax Court, see *Corbett* v. *Frank*, 293 F.2d 501 (C.A. 9, 1961), if the taxpayer desires to contest the asserted defi-

ciency prior to payment. The importance of this right to contest an asserted tax deficiency prior to payment has caused numerous courts to enjoin attempts by the government to collect asserted deficiencies before sending out a deficiency notice or before termination of Tax Court proceedings. *Clark* v. *Campbell*, 341 F.Supp. 171 (N.D.Tex. 1972); *Schreck* v. *United States*, 301 F.Supp. 1265 (D.Md. 1969); *Farley* v. *Scanlon*, 64-1 USTC ¶ 9371 (E.D.N.Y. 1964); *Dierks* v. *United States*, 215 F.Supp. 338 (S.D.N.Y. 1963); *Steiner* v. *Nelson*, 259 F.2d 852 (C.A. 7, 1958); *Merlin* v. *Sanders*, 144 F.Supp. 541 (N.D.Ga. 1956), aff'd on other grounds 243 F.2d 821); *Maxwell* v. *Campbell*, 205 F.2d 461 (C.A. 5, 1953); cf. *Yellow Cab Co.* v. *U.S.*, 90 F.2d 699 (C.A. 7, 1937). Here the opinion by the Court of Appeals, contrary to all these cases cited above, allows the Commissioner to collect a tax without ever having issued a deficiency notice as required under § 6213. Thus the Court of Appeals has undermined the long-standing Congressional policy that taxpayers should have the right to contest asserted deficiencies prior to payment.

Other adverse ramifications arising from the conclusion reached by the Court below include the following:

(a) A taxpayer against whom unlawful assessment and collection procedures have been effected would be denied the right to institute suit for recovery for a period of six months if the Commissioner fails to act in that time. § 6532.

(b) Where as here, no notice of the unlawful assessment and collection were given, there is no point in time from which to appropriately measure statutory limitation periods for instituting refund procedures includ-

ing the time within which a further refund claim may be filed.

(c) A taxpayer who has submitted an amount as payment of a given tax liability (here, the deficiencies for 1959-1962) which is applied to the unlawful assessment will be unable to properly initiate refund procedures with respect thereto since those liabilities will not have been paid. *Flora* v. *United States,* 362 U.S. 145 (1960).

In effect the decision of the Court below, if allowed to stand, can, at its worst, totally abrogate the procedural standards established for the orderly administration of the federal Internal Revenue Code.

B. *The Decision of the Court Below is in Conflict with Decisions of this Court Concerning Informal Refund Claims.*

The decision below conflicts with *United States* v. *Kales,* 314 U.S. 186 (1941), and *Angelus Milling Co.* v. *Commissioner,* 325 U.S. 293 (1945). In the latter opinion, p. 297, this Court observed that:

> Even tax administration does not as a matter of principle preclude considerations of fairness,

and cautioned against unnecessarily stringent practices in procedural matters as follows:

> It smacks too much of the strangling niceties of common-law pleading to find no existing claim . . .

Treasury Regulations § 301.6402-3(b) provides (emphasis supplied):

"(b)(1) A *properly executed individual,* fiduciary, or corporation *income tax return shall,* at the election of the taxpayer, *constitute a claim for refund or credit* within the meaning of section 6402 and section 6511 *for the amount of the overpayment disclosed by such return.* For purposes of section 6511, such claim shall be considered as filed on the date on which such return is considered as filed, except that if the requirements of § 301.7502-1, relating to timely mailing treated as timely filing, are met the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return was mailed.

"(2) An election to treat the return as a claim for refund or credit shall be evidenced by a statement on the return setting forth the amount determined as an overpayment *and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return is filed.* If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated income tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

"(3) Notwithstanding elections made under subparagraph (2) of this paragraph, for taxable years ending after December 20, 1972, *the Commissioner,* within the applicable period of limitations, *may credit any overpayment of individual,* fiduciary, or corporation *income tax, against any outstanding liability for*

any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) *owed by the taxpayer making the overpayment, and only the balance, if any, shall be treated in the manner so elected."*

The return as filed, if it fails to qualify as a formal claim for refund or credit, does so only because of the attempt to have the credit applied to past years' liabilities rather than as against estimated tax liability for the next succeeding year. So minor a discrepancy would hardly appear to be a sufficient basis on which to support an unlawful additional tax of $22,406.05.

This conclusion is particularly true where the body of the income tax return as filed contains detailed itemization and description of income received and deductions claimed which apprise the Commissioner of all essential facts. The Form 1040 is designed to provide the Commissioner with precisely the kind of detail needed to establish a particular tax liability, and there can be no doubt the 1964 return as filed provided such detailed information.

Concededly the scheduling of some of the information by attachment to the return was not the most lucid presentation. Nevertheless, upon examination, it cannot be misinterpreted, and the Commissioner during the audit of 1967 understood the schedule for exactly what it purported to be. He chose instead, to ignore the return and to impose a tax liability greater than the $17.42 authorized by the return without complying with deficiency procedures.

The near literal compliance of the 1964 return with the regulatory definition of a formal claim for refund or credit makes the conclusion of the Court below that it was not at

least an informal claim for refund or credit all the more incomprehensible.

> "Informal refund claims have long been held valid . . . But they must have a written component . . ., and should adequately apprise the Internal Revenue Service that a refund is sought and for certain years. . . . In addition . . . the only essential is that there be made available sufficient information as to the tax and the year to enable the Internal Revenue Service to commence, if it wishes, an examination into the claim." *American Radiator & Standard Sanitary Corp.* v. *U.S.*, 318 F.2d 915, 920 (Ct.Cl. 1963).

Both in *American Radiator* and in *Thompson* v. *United States*, 332 F.2d 657 (C.A. 5, 1964), the courts in determining whether there had been an adequate informal claim looked not only to the actual writing filed with the Commissioner but also at the course of dealing between the taxpayer and the Commissioner, to determine whether there was "notice fairly advising the Commissioner of the nature of the taxpayer's claim." *United States* v. *Kales*, 314 U.S. 186, 194 (1941).

This analysis gives § 7422(a) an interpretation which accomplishes its dual purposes of giving the Commissioner a chance to review claims before he is sued without unfairly penalizing taxpayers who have not complied precisely with the regulations governing claims for refund or credit. Adopting this approach, the District Court in this case held, "[I]t is fair to regard plaintiffs' inartistic 1964 tax return as being at least an implied § 7422(a) claim for a refund."

But the Court of Appeals in its opinion ignored both

prior case law and the Congressional purpose behind § 7422(a). It places great significance on whether a "perfecting" claim has been filed and does not consider whether the 1964 return fairly puts the Commissioner on notice of taxpayers' claims. This departure from both the prior case law and the Congressional purpose behind § 7422(a) warrants this Court granting certiorari to review the decision below.

The Court below led itself into the erroneous conclusion by separate steps each of which constituted error in itself. The Court said:

> "Perhaps the most charitable view of the 1964 return would be that it was an informal, if unauthorized, 'claim for credit.' However, the present refund action is outside the scope of any such claim. See *Pelham Hall Co.* v. *Carney*, 111 F.2d 944, 948 (1st Cir. 1940)."

This case is not like *Carney* where the taxpayer introduced at trial a legal theory and facts not stated in its claim for refund. Here plaintiffs are relying upon the return as filed. No new legal theories or new facts are needed. Further § 7422(a) permits either a "claim for refund *or credit*" as adequate support for a suit for refund. Thus the Court of Appeals' own analysis suggests that plaintiffs have met the requirements of § 7422(a) for prosecution of this suit.

Similarly, the thrust of the statement in the opinion below supported by footnote 4 appears to be erroneous:

> "The 1964 return was a claim for refund only in the general sense that a taxpayer who remits more money than his return shows due for the taxable year may be thought to want his money back.[4]

> "[4] Any inference that a refund was wanted was further contingent upon the IRS' later declining to apply monies as requested. Contrary to the taxpayers' assertions, the IRS has no duty to apply the remitted and withheld amounts as indicated, although it perhaps could have done so. See 26 U.S.C. § 6402(a)."

§ 6402(a) permits a refund or credit of overpayments only; no other disposition is authorized. The general rule of law is that a debtor may designate the application of a payment to any component of the debt owed, and the creditor is without power to modify the application. *Payson* v. *Commissioner*, 18 CCH Tax Ct. Mem. 686, 689 citing *Gordon* v. *Hobart*, 10 Fed. Cas. 787 No. 5608 (1842).

Accordingly, if, as occurred, the Commissioner chose not to honor the taxpayers' requests for credit of the remitted and overpaid amounts, taxpayers clearly desired a refund of the payments. The taxpayers are at a loss to suggest a third reasonable construction.

C. *Alternatively, The Decision Below Conflicts With Rosenman v. U.S., 323 U.S. 658 (1945).*

If the taxpayers' 1964 return fails to qualify as either a formal or an informal claim for refund or credit of tax, then with respect to the $7,567.23 transmitted with the 1964 return, no prior claim for refund of such amount is required to sustain a suit for the return thereof. In the *Rosenman* case, this Court considered the difference between a deposit of money and a payment of tax. In that case, taxpayer made deposits against a suggested tax liability which the Commissioner deliberately had not assessed. The Court concluded that the predecessor to § 7422(a) applied only to

actions to recover "tax" and did not present a bar to the recovery of a mere deposit of funds. In *Stuart* v. *Chinese Chamber of Commerce of Phoenix*, 168 F.2d 709 (C.A. 9, 1948), cash in the possession of the taxpayer belonging to the appellee was seized by the District Director and applied to the taxes assessed against the taxpayer. The Court held that suit for refund of the seized funds was not subject to the requirement of filing a prior claim for refund or credit of tax. The Court quoted *Bull* v. *United States*, 295 U.S. 247, 261 (1935), in support of its conclusion as follows:

> "The United States, we have held, cannot, as against the claim of an innocent party hold his money which has gone into its treasury by means of the fraud of their agent. [Case cited.] While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Nat. Bank Case applies with equal force to this situation.
>
> > 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial . . .' "

The mere clerical error of entering as taxes assessed by the plaintiffs' 1964 return the figure $22,423.47 should not be sufficient to make the funds paid with the return taxes for the year 1964. The funds were tendered as taxes for the years 1959-1962. The Commissioner was not authorized to apply the amount transmitted by the taxpayers with their

1964 return to any other liability. Thus the sum paid with the return, $7,567.23, should be treated as a mere deposit in the hands of the government held by it without authority even to this time.

Further in holding that § 7422(a) applied to this case, the Court of Appeals ignored the related problem of the defendant's liability for interest on overpayments under § 6611 of the Internal Revenue Code. As this Court said in *Rosenman*, pp. 662-663,

> "[W]here taxpayers have sued for interest on the 'overpayment' of moneys received under similar conditions, the Government has insisted that the arrangement was merely a 'deposit' and not a 'payment" interest on which is due from the Government . . . If it is not payment in order to relieve the Government from paying interest on a subsequently determined excess, it cannot be payment to bar suit by the taxpayer for its illegal retention."

And see *Fortugno* v. *C.I.R.*, 353 F.2d 429 (C.A. 3, 1965) (interest denied to taxpayer).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES V. CLEMENT, JR. and
BARBARA B. CLEMENT

v.

UNITED STATES OF AMERICA

Civil Action No. 71-886-W

OPINION

August 20, 1971

WYZANSKI, C.J.

Plaintiffs bring this action to recover federal income taxes assessed and collected for the year 1964. Jurisdiction is alleged under 28 U.S.C. §§ 1340 and 1346. Defendant moves to dismiss the complaint because plaintiffs failed to file with the Treasury a claim for a refund.

The relevant statute, § 7422(a) of the Internal Revenue Code, and regulation, Section 301.6402-3(b) provide:

Section 7422(a)

> "(a) No Suit Prior to Filing Claim for Refund — No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected,

or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

Section 301.6402-3(b)

"A properly executed individual . . . income tax return shall, at the election of the taxpayer, constitute a claim for refund or credit within the meaning of Section 6402 and Section 6511 for the amount of the overpayment disclosed by such return . . . An election to treat the return as a claim for refund or credit shall be evidenced by a statement on the return setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return is filed. . ."

The complaint, supplemented by undisputed facts, shows that these are plaintiffs' essential allegations.

Plaintiffs, on page 1 of their income tax return for 1964, in answer to item 12 "Tax (from either Tax Table, line 10, or Tax Rate Schedule, line 11)", stated "Schedule attached $22,423.47." The attached schedule showed:

"Net Deficiency Per R.A.R. dated January 20, 1965	$35,381.13
Tax on amount in Line 11.d., Page 1 of this Return	17.42
Total Liability	35,398.55
Net Overassessment Per R.A.R. dated January 20, 1965	12,975.08
Amount of Tax	$22,423.47"

Alson on page 1 of their income tax return for 1964, plaintiffs, in answer to item 17c., reported that $14,856.24 had been withheld, and, in answer to item 18, reported that $7,567.23 (being the balance of the total tax of $22,423.47) was due.

Plaintiffs filed their return and paid that $7,567.23 balance on April 15, 1965.

June 13, 1967 the District Director of IRS sent plaintiffs an examination report making adjustments in their 1964 return. It showed that the IRS regarded the correct tax of plaintiffs for 1964 as $20,875.86, and that plaintiffs had made an overassessment of $1,547.61.

April 22, 1970 the IRS notified plaintiffs that its records indicated that no claim for refund had been filed and that it was closing the case on the basis of no over-assessment.

April 15, 1971 plaintiffs brought in this court a complaint seeking to recover $22,406.05 as taxes unlawfully assessed and collected, and alleged that plaintiffs had in their 1964 federal income tax return made a claim for refund of that

amount. The complaint also alleged that defendant had not applied that refund as requested.

The initial difficulty faced by plaintiffs is that their 1964 tax return does not make a claim for refund in the appropriate place on the first page, lines 19-21. But this is a minor difficulty. Read with some indulgence, plaintiffs' 1964 income tax return may be interpreted reasonably as follows: (1) plaintiffs acknowledge that for 1964 they have a tax liability of $17.42; (2) plaintiffs claim that they have had excess 1964 withholdings of income tax of somewhat less than $15 thousand, (3) plaintiffs enclose a check for somewhat over $7 thousand, and (4) they request the government to apply the excess 1964 withholdings and the enclosed check as a somewhat over $22 thousand credit on account of deficiencies for the years 1959-1962 shown in a Revenue Agent's Report dated January 20, 1965.

A more serious difficulty is that plaintiffs' 1964 tax return requests that the supposed overpayments be used to credit deficiences attributable to the years 1959-1962. Both the applicable regulation, heretofore quoted, and line 20 of the 1964 tax return used by plaintiffs make it clear that the only credit permitted is one "for the taxable year immediately succeeding the taxable year for which such return is filed." Therefore, it cannot rightly be said that plaintiffs have made a claim for the type of credit contemplated by § 7422(a).

But it is fair to regard plaintiffs' inartistic 1964 tax return as being at least an implied § 7422(a) claim for a refund of an overpayment if it cannot be regarded as a claim for a credit.

However, if the taxpayers are to have the benefit of such a broad construction of what they filed, the government ought to be treated with equal latitude. Admittedly, the letter the IRS sent on June 13, 1967 did not constitute a deficiency notice within the description of 26 U.S.C. § 6213(a). Nor was it, as contemplated by 26 U.S.C. § 6532(a), sent by certified or registered mail by the Secretary of the Treasury or his delegate as a "notice of the disallowance of the part of the claim" to which this suit relates. Yet if plaintiffs' 1964 tax return may be regarded as a sufficient claim of a refund of an overpayment of $22+ thousand, it seems fair to regard the government's response as a disallowance of $20,875.86 of that claim and an allowance of $1,547.61 of the claim.

With respect to the amount of $20,875.86 disallowed by the notice of June 13, 1967, plaintiffs are barred by the 2 year statute of limitations prescribed in 28* U.S.C. § 6532(a), even though the government's notice was not sent by certified or registered mail. Having received the notice promptly, plaintiffs have not been injured by any want of ceremony.

As to the balance of $1,547.61 plaintiffs' complaint alleges a valid cause of action.

The court suggests, but does not direct, that the plaintiffs move for summary judgment for $1,547.61 plus interest.

Motion to dismiss denied.

CHARLES E. WYZANSKI
Chief Judge

*Error in the original opinion. Should be 26 U.S.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CHARLES V. CLEMENT, JR. and
BARBARA G. CLEMENT,
Plaintiffs

v.

UNITED STATES OF AMERICA,
Defendant
Civil Action No. 71866-W

MEMORANDUM AND ORDER

On August 20, 1971, this court denied the government's to dismiss the complaint, and, in its Opinion of that date, found that, fairly construed, the plaintiffs' 1964 tax return was a claim for refund of an overpayment in the amount of $22,423.47, and that the IRS response to that claim, by letter of June 18, 1967, was, fairly read, a disallowance of $20,875.86, and an allowance of $1,547.61 of the claim. With respect to the former sum, this court ruled that the plaintiffs were time barred. With respect to the latter sum, motion for partial summary judgment in plaintiffs' favor was invited.

On September 20, 1971, plaintiffs submitted their motion for summary judgment, but adverted to the entire amount of $22,423.47.

Meanwhile, on November 10, 1971, this court granted the government's motion for summary judgment with respect

to that portion of the claim found to be time-barred, $20,875.86.

Plaintiffs' Motion for Summary Judgment is therefore modified to seek judgment in the amount of $1,547.61 only, and, as modified, is allowed.

WYZANSKI, J.

June 13 '72

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CHARLES V. CLEMENT, JR. and
BARBARA G. CLEMENT

Plaintiffs

v.

UNITED STATES OF AMERICA

Civil Action No. 71-866-W

JUDGMENT

June 14, 1972

WYZANSKI, J.

In accordance with the memorandum and order of the Court entered June 13, 1972, It is hereby ORDERED:

Judgment for the plaintiffs in the amount of $1,547.61.

WYZANSKI
U. S. District Judge

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 72-1244

CHARLES V. CLEMENT, JR., et al.,

PLAINTIFFS, APPELLANTS,

v.

UNITED STATES OF AMERICA,

DEFENDANT, APPELLEE.

No. 72-1273

CHARLES V. CLEMENT, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

UNITED STATES OF AMERICA,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before

ALDRICH, MCENTEE and CAMPBELL
Circuit Judges

Chester M. Howe, with whom *Edward T. Robinson* and *Ely, Bartlett, Brown & Proctor* were on briefs, for Charles V. Clement, Jr., et al.

Louis A. Bradbury, Attorney, Department of Justice, with whom *Scott P. Crampton,* Assistant Attorney General, *Joseph L. Tauro,* United States Attorney, *Meyer Rothwacks,* and *Leonard J. Henzke, Jr.,* Attorneys, Tax Division, Department of Justice, were on brief, for United States.

January 26, 1973

CAMPBELL, *Circuit Judge.* On April 15, 1971, taxpayers sued in the district court to recover federal income taxes which they alleged were illegally assessed and collected for the year 1964. The United States moved to dismiss on the ground that the taxpayers had failed to file a claim for refund as required by 26 U.S.C. § 7422(a). The district court denied the motion, but made rulings, hereinafter described, which resulted in a small recovery. We hold that the motion to dismiss should have been allowed.

I

On January 20, 1965, the District Director of the Internal Revenue Service sent taxpayers an agent's examination report proposing tax deficiencies for the years 1959-1962 of $35,381.13. These resulted from a determination that taxpayers had erroneously reported income from a trust, of which they were grantors, to the trust rather than to themselves.

Taxpayers were asked to return an enclosed waiver form if they accepted the findings, and were told that they might pay any additional tax due. They were also advised to request a conference with IRS representatives if they did not accept the findings, and to file a written protest. On January 29, 1965, a so-called 90-day letter was sent taxpayers, advising them that unless within 90 days they contested the determination of tax liability for 1959-1962 by petitioning the Tax Court, the deficiencies would be assessed for collection. There is no evidence that taxpayers either returned a waiver form or filed a petition with the Tax Court.

On April 14, 1965, taxpayers filed a joint return for the tax year 1964. The return showed a total income of $4,593.63, deductions of $2,084.77 and exemptions of $2,-

400.00, leaving (on Line 11d) an amount of $108.86. Instead, however, of figuring their tax on this amount in the return, the taxpayers eliptically referred to "Schedule Attached", and then proceeded to list on lines 12 and 16 as their "Tax" and "Total Tax", the sum of $22,423.17, against which they credited withholdings (line 17a) of $14,856.24, leaving a Balance Due of $7,567.23.[1] Enclosed with their return was a check for that amount.

On June 13, 1967, The District Director sent taxpayers, through their counsel, another agent's examination report, proposing deficiences for 1963 and 1965, and showing for 1964 "Corrected income tax liability", $20,875.86, and hence an overassessment of $1,547.61. The agent's report explained that taxable income for 1964 had been computed by, among other things, including in taxpayers' income the trust income, and disallowing taxpayers' asserted "Claim of Right" of $45,000 (an item not involved in this case). With reference to the 1959-1962 assessment, the agent wrote:

> The taxpayer did not pay the additional assessment, however, when the taxpayer filed his 1964 individual return he computed the tax by figuring in the additional deficiency for the prior years 1959-62. . . .

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[1] Attached to the form was a typed statement listing four columns of figures and totals, requesting the IRS to determine a Claim of Right item not here relevant, and then providing:

Net Deficiency Per R.A.R. dated January 20, 1965	$35,381.13
Tax on amount in Line 11.d., Page 1 of this Return	17.42
Total Liability	$35,398.55
Net Overassessment Per R.A.R. dated January 20, 1965	12,975.08
AMOUNT OF TAX	$22,423.47

> The taxpayer contends that this additional assessment of deficiency has been paid for the prior years as the result of the above described computation of tax in the 1964 years. . . .

On December 29, 1969, the assistant chief of the appellate branch office of the IRS sent to taxpayers, through their counsel, a notice of deficiencies for the taxable years 1963 and 1965, which showed, as well, an overassessment for 1964 of $1,547.61. The notice said, with reference to the overassessment:

> The overassessment claim herein for the year 1964 should not be regarded as finally determined. When final determination has been made the overassessment to the extent of the amount allowable will be made the subject of a notice of adjustment, which will reach you in due course through the office of the District Director of Internal Revenue for your district, and will be applied by that official in accordance with Section 6402 of the Internal Revenue Code of 1954, provided that you have fully protected yourself against the expiration of the statute of limitations with respect to the apparent overassessment referred to in this letter by filing with the District Director of Internal Revenue for your District a timely claim for refund on the attached form 843, the basis of which may be as set forth herein.

On April 22, 1970, the assistant chief of the appellate branch office of the IRS sent taxpayers a notice stating: "Our records indicate that no claim for refund has been filed for the above year [1964]. Accordingly, we are closing this case out of this office on the basis of no overassessment."

Taxpayers brought suit in the district court on April 15, 1971, for refund of $22,406.05. They asserted that the Commissioner lawfully could collect for 1964 only $17.42, the amount allegedly shown as their tax liability for 1964. The remainder, $22,406.05, they asserted to have been unlawfully collected for that year.

The district court ruled that the 1964 return, with attachment, was an implied § 7422(a) claim for a refund. It also ruled, however, that the 1967 agent's examination report was a disallowance of $20,875.86 and that therefore the taxpayers' suit for refund, to the extent of that amount, was untimely under the two-year limitations for suits for refund. § 6532(a)(1). The district court granted taxpayers summary judgment for the remaining $1,547.61.

Both sides have appealed.

II

At the outset we reject any contention that because the Treasury made an assessment which was, or may have been, procedurally improper, taxpayers can sue for a refund without first filing a claim for refund or credit as required by § 7422(a). Conceivably, although we do not need to decide the question, taxpayers are right that the assessment and collection for 1964 of amounts over $17.42 was illegal. Involuntary assessment and collection of an amount above that shown to be due in the return must be pursuant to statutory deficiency proceedings, not here undertaken. 26 U.S.C. §§ 6211-6216. *See Jamison* v. *Repetti*, 239 F.2d 901, 902 (9th Cir. 1956), *Schmidt* v. *C.I.R.*, 272 F.2d 423, 429 (9th Cir. 1959). But we see nothing to take this case outside the broad coverage of § 7422(a), applying to suits for the recovery of taxes "erroneously or illegally assessed or collected" and "any sum wrongfully collected." Whether

the alleged error in assessment and collection was "procedural" or "substantive" is immaterial.[2]

The question must accordingly be whether taxpayers' 1964 return, the only document filed with the IRS which is alleged to qualify, is a claim for refund or credit within the meaning of § 7422(a).

Viewed as a "formal" claim, the return is obviously insufficient, as the district court found. It was not in compliance with Treasury Regulations § 301.6402—2(b) and (c), which provide for the filing of a special verified form (803) setting forth "in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Nor did it comply with Regulations § 301.6402—3(a) and (b), which require that a claim for refund made on a properly executed tax reurn be evidenced

> by a statement on the return setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeed-

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2 In *Stuart* v. *Chinese Chamber of Commerce*, 168 F.2d 709 (9th Cir. 1948), narcotics agents seized from the safe of one "Thet" money belonging to appellees, and the I.R.S. applied it against Thet's liability. The court held that appellees need not have filed a claim for refund, since they were not "taxpayers" as contemplated by the statute.

In *Steiner* v. *Nelson*, 259 F.2d 853 (7th Cir. 1958), refunds were given in connection with an injunction against illegal collection pursuant to § 6213(a), and the government had not raised objection to the non filing of a refund claim in the district court.

We think these and other cases cited by taxpayers are readily distinguishable from the present case.

ing the taxable year for which such return is filed.[3] Not only did taxpayers leave blank the lines on the return showing a claim for refund or credit, they also, more importantly, failed anywhere else on the return or attachment to ask for a refund or to request the only form of credit contemplated by the regulations—namely, application of overpayment against the taxpayers' estimated income tax for the immediately succeeding taxable year.

Taxpayers argue, however, that if not formally adequate, the return is at least to be considered an "informal", or, as the district court found, an "implied" claim.

Informal claims have normally been recognized only in conjunction with later-filed "perfecting" claims, the informal claim being allowed to toll the statute of limitations. *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62 (1933), *United States* v. *Kales*, 314 U.S. 186 (1941). Use of an informal claim to toll limitations, with a later perfecting amendment to comply with the statutory command that a claim be filed "according to the provisions of law . . . and the regulations . . ." (§ 7422(a)), was borrowed by analogy from the notion that "amendment of a pleading will take effect by relation." *United States* v. *Memphis Cotton Oil Co.*, above, 288 U.S. at 67.

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[3] 26 U.S.C. § 6402 states:

(a) General Rule. — In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of any internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

(b) Credits against estimated tax. — The Secretary or his delegate is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary (or his delegate) to be an overpayment of the income tax for a preceding taxable year.

While we do not say that an unperfected "informal" claim, if clearly recognizable as such, might never be sufficient standing alone (*see Thompson* v. *United States*, 332 F.2d 657 (5th Cir. 1964), the 1964 return is totally inadequate as an informal substitute for the claim contemplated by § 7422(a).

The 1964 return was a claim for refund only in the general sense that a taxpayer who remits more money than his return shows due for the taxable year may be thought to want his money back.[4] Such an assumption would be warranted in every case. Errors or misunderstandings may give rise to a claim for refund. They do not state one.

If anything is clear, it is that when taxpayers filed the 1964 return, with remittance, they were not then claiming a refund. The Commissioner, understandably, did not treat the return as a claim for refund. He need not, at his peril, "weigh circumstantial evidence" in order to ascertain a taxpayer's wishes. *Barenfeld* v. *United States*, 442 F.2d 371, 375 (Ct. Cl. 1971). If what the agent, in 1967, proposed instead to do with the remitted and withheld amounts was unsatisfactory, taxpayers were required, before suing to recover their money, to submit their claim administratively by filing a recognizable claim. This they did not do.

Perhaps the most charitable view of the 1964 return would be that it was an informal, if unauthorized, "claim for credit." However, the present refund action is outside

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4 Any inference that a refund was wanted was further contingent upon the IRS' later declining to apply the monies as requested. Contrary to taxpayers' assertions, the IRS had no duty to apply the remitted and withheld amounts as indicated, although it perhaps could have done so. See 26 U.S.C. § 6402(a).

the scope of any such claim. *See Pelham Hall Co.* v. *Carney*, 111 F.2d 944, 948 (1st Cir. 1940).

Never having administratively filed the claim they now assert, taxpayers may not maintain this action.

The judgment of the district court is vacated and the case remanded with instructions to dismiss the action. No costs.

THAYER-DEARING COMPANY LEGAL PRINTERS BOSTON